

## EXHIBIT C

SETTLEMENT AGREEMENT AND STIPULATION FOR ENTRY OF ORDER R7-2017-0007  
METHODOLOGY TO ASSESS DISCRETIONARY PENALTIES  
NILAND SANITARY DISTRICT  
MUNICIPAL WASTEWATER TREATMENT PLANT  
NILAND – IMPERIAL COUNTY

Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order R7-2017-0007 (Settlement Order) alleges the Discharger violated NPDES No. CA0104451 on multiple occasions. As identified in Exhibit B, the Discharger has committed thirty-five (35) Non-Mandatory Minimum Penalty (Non-MMP) violations of Waste Discharge Requirements (WDRs) Orders R7-2003-0049 and R7-2008-0020 subject to discretionary penalties. In addition, as indicated in Paragraph 29 of the Stipulation, the Discharger has been in violation of CDO R7-2012-0024 since February 28, 2014. In sum, the Prosecution Team is seeking discretionary penalties for the violation of CDO R7-2012-0024 and the thirty-five (35) Non-MMP violations of Waste Discharge Requirements (WDRs) Orders R7-2003-0049 and R7-2008-0020.

In determining the amount of any liability imposed under Water Code sections 13385 and 13350, the Regional Water Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from violations, and other matters that justice may require (Water Code sections 13327, 13385, sub. (e)). There are two (2) discretionary penalties listed below:

**A. Failure to Meet CDO R7-2012-0024 Milestone No. 4 (915 days of CDO violations)**

**B. Used Uncertified Laboratory (35 Non-MMP violations)**

Each discretionary penalty is assessed under its own methodology, in the following paragraphs, with a step-wise application of the Enforcement Policy methodology for the non-MMP violations alleged in the Stipulation and the proposed liability for these violations.

**A. FAILURE TO MEET CDO R7-2012-0024 MILESTONE No. 4 (CDO violations)**

1. POTENTIAL FOR HARM FOR DISCHARGE VIOLATIONS

This factor is not applicable because the violations are non-discharge violations.

2. PER GALLON AND PER DAY ASSESSMENT FOR DISCHARGE VIOLATIONS

This factor is not applicable because the violations are non-discharge violations.

3. PER DAY ASSESSMENT FOR NON-DISCHARGE VIOLATIONS:

The potential harm is moderate because the Discharger was operating under the CDO with higher interim effluent limitation for copper that has potential risk to impact aquatic lives in the receiving water. The deviation from requirements is moderate. The Discharger has struggled to maintain continuity at the Niland Sanitary District (NSD) Board of Directors and have the necessary institutional capacity to comply with the CDO requirements. The initial CDO Milestone was completed on schedule, inclusive and up to completion of funding application for the selected project of the 2012 Preliminary Engineering Report (PER). The 2012 PER was procured and directed under the United States Environmental Protection

## EXHIBIT C

Agency's Planning and Development Assistance Program administered through the Border Environmental Cooperation Commission (BECC) and their qualified engineer project managers. However, subsequent work to initiate the design (on schedule with the CDO) uncovered critical technical omissions in the PER that deemed the alternatives considered unfeasible (non-percolating soils in the area). This critical technical flaw resulted in a subsequent need for additional funding agreements, procurement processes, and engagement of other firms to prepare another PER for a new compliance project also demanded new environmental documents. These resulted in the exceedance of the CDO deadlines. To complicate matters, NSD experienced substantial turnovers in staff and its legislative body during this period. There was a time in the recent past where the Imperial County Board of Supervisors was called upon to appoint members to the NSD Board of Directors because it lacked a quorum to conduct official businesses. With that and staff turnover, there was no institutional capacity or knowledge to address issues associated with the subject CDO. Nevertheless, NSD must comply with Board Orders. **Therefore, the Prosecution Team assigned a per day factor of 0.35 for nine-hundred and fifteen (915) days of violation.**

Under Water Code section 13350(e), the maximum liability for these violations is \$4,575,000 (915 days of violation x \$5000/day). Applying the per day factor to the maximum liability yields an initial liability of \$1,601,250 (0.35 x \$4,575,000)

#### 4. ADJUSTMENTS TO DETERMINATION OF INITIAL LIABILITY

##### *Culpability*

The Discharger has a neutral culpability. This assessment is based on the fact that the Discharger is responsible for securing funding for a project that would ensure compliance with Regional Water Board Orders, including the Discharger's proposal to phase out the discharge of effluent to receiving waters. Additionally, the Discharger is responsible for taking the necessary steps to achieve compliance. NSD secured professional services from USEPA-sponsored programs and relied on the agency's technical expertise which ultimately resulted in technically unfeasible alternatives. **Therefore, the Prosecution Team assigned a culpability factor of 1.0 (neutral).**

##### *Cleanup and Cooperation*

This assessment is based on the fact that the Discharger is responsible for making necessary progress toward coming into compliance. NSD has made progress to advance compliance with the established milestones of the CDO. The Discharger is securing substantial financial assistance from NADBank/BECC, USEPA, and USDA to finance the capital costs (approximately \$5.8M) associated with its preferred alternative and has completed a 2015 FINAL PER by The Holt Group for its alternative (hereafter "Preferred WWTF Project<sup>1</sup>"). Nevertheless, there have been substantial delays that caused violations of the CDO. Further, the Discharger failed to contact the Regional Water Board prior to the CDO's Compliance date so that the Regional Water Board could at least consider granting a compliance deadline extension. With this as a background, the current NSD Board of Directors has worked closely with the Prosecution Team, Imperial County, USEPA, NADBank/BECC, USDA, and LAFCO to find its way through its revenue problems, move the Preferred WWTF Project forward for implementation, ensure NSD Board continuity, and

---

<sup>1</sup> Under the Preferred WWTF Project, the Discharger proposes to abandon its NPDES discharge to surface water and instead use evaporation ponds for effluent disposal.

## EXHIBIT C

acquire additional institutional capacity. Further, the Current NSD Board of Directors and its staff are committed to achieving compliance. **Therefore, the Prosecution Team assigned a cleanup and cooperation factor of 1.0.**

### *History of Violations*

This assessment is based on the fact that the Discharger has been issued two (2) CDOs and three (3) ACLC's under enforcement matters. **Therefore, the Prosecution Team assigned a history of violation factor of 1.1.**

Based on these adjustments, the amount revised from the initial liability is \$1,761,375.00 (or  $\$1,601,250 \times 1.0 \times 1.0 \times 1.1$ ).

### 5. TOTAL BASE LIABILITY AMOUNT

The amount revised from the initial liability, \$1,761,375.00 represents the Total Base Liability Amount.

### 6. ABILITY TO PAY AND ABILITY TO CONTINUE IN BUSINESS

The Enforcement Policy provides that if a Regional Water Board has sufficient financial information to assess the violator's ability to pay the Total Base Liability Amount, or to assess the effect of the Total Base Liability Amount on the violator's ability to continue in business, then the Total Base Liability may be adjusted. In this case, the Discharger is a publically-owned entity and the 2015 fiscal year audited financial statements are available through the Imperial Local Agency Formation Commission, with whom they are currently associated.<sup>2</sup>

To evaluate the Discharger's ability to pay, the Prosecution Team utilized the US EPA financial model MUNIPAY (Version 5.6.0). MUNIPAY uses financial information input from the most recent financial statement and demographic data collected by the US Census Bureau for the local area. In this case, the MUNIPAY output indicates that the Discharger does not have the ability to pay the Total Base Liability Amount. The 2015 financial statements indicate that the Discharger's current liabilities (or liabilities payable in the near-term) exceed current liabilities (e.g. cash) by over \$350,000. In addition, annual operating expenses exceed revenue by nearly \$20,000. Demographically, NSD's service area has a median household income of \$19,653 and has seen a population decline from 2000 to 2014 of 7%. Nearly 50% of the population within this service area earns less than 125% of the poverty line.

Based on this analysis, it is unreasonable to conclude that the Discharger can afford to pay the Total Base Liability Amount without additional funding. Based on their financial situation, outside funding may not be available without a substantial user rate increase. Based on the demographic analysis, a rate increase may be prohibitive as the Discharger's rates appear to exceed \$40 per month. As funding was secured from Imperial County, the Discharger may have the ability to pay. Based on financial and demographic concerns, the Prosecution Team recommends a reduction in the Total Base Liability Amount, which assumes the funding secured from the County. The proposed Total Base Liability Amount reduction is discussed under the subsequent section.

---

<sup>2</sup> [http://www.iclafco.com/media/managed/052616hearing/Exhibit\\_A\\_NS\\_D\\_1\\_16\\_Audited\\_Financial.pdf](http://www.iclafco.com/media/managed/052616hearing/Exhibit_A_NS_D_1_16_Audited_Financial.pdf)

## EXHIBIT C

### 7. OTHER FACTORS AS JUSTICE MAY REQUIRE

**Environmental Justice Issues**—As stated above, NSD’s service area has a median household income of \$19,653 and has seen a population decline from 2000 to 2014 of 7%. Nearly 50% of the population within this service area earns less than 125% of the poverty line. The population is 77 percent minority and severely disadvantaged. The Prosecution Team proposes to reduce the Total Base Liability Amount by a factor of 0.3 in consideration of environmental justice issues that indicate that the Total Base Liability Amount would have a disproportionate impact on a particular disadvantaged group. This reduction reduces the liability amount to \$528,400 (rounded) ( $\$1,761,375.00 \times 0.3$ )

**Prevailing State Interests**—The Discharger has developed its Preferred WWTF Project in consultation with USEPA, NADBank/BECC, and USDA to minimize its regulatory liability and ensure long-term compliance with Board Orders. It has also received technical support from Imperial County. Further, it has received significant regulatory guidance and support from the Colorado River Basin Water Board staff. The projected capital costs for this project would be approximately \$5.8M, which would be entirely funded by grants from USEPA, NADBank/BECC, and USDA. The Discharger is also seeking a line of credit from Imperial County to remain viable. BECC is conducting for the Discharger a sewer rate study to determine the level of revenue and corresponding sewer rates it must assess to properly operate and maintain its proposed Preferred WWTF Project. The study should be completed by March 2017. Preliminary estimates indicate that the Discharger will have to raise its sewer rates by as much as 35%. The NSD Board of Directors and its staff are committed to conduct the necessary outreach and education of its residents in an effort to secure voter approval for the rate increase recommended by the BECC study.

The Prosecution Team has consulted with Imperial County, USEPA, NADBank/BECC, USDA, and Imperial County LAFCO regarding this matter. USEPA, NADBank/BECC and USDA have already committed more than \$800,000 to the Preferred WWTF Project and remain committed to see the project through, provided the Discharger and the Colorado River Basin Water Board reach a satisfactory resolution to this matter. Similarly, Imperial County and LAFCO staff have spent numerous hours assisting the Discharger to find a way forward to address its revenue problems, outstanding liability<sup>3</sup>, and remain viable. They too remain committed to continue providing assistance to NSD to the extent practicable. Considering the foregoing, neither Imperial County nor LAFCO consider that dissolving the District at this point is in anyone’s best interest. Moreover, on January 24, 2016, Imperial County approved a loan to NSD to help it pay its liabilities, provided the overall impact to tax payers can be minimized to the maximum extent practicable. In this context, Imperial County is requesting that the Prosecution Team further minimize its recommended liability so that the ultimate liability assessed by the Regional Water Board can also minimize the impact it will likely have on Niland residents. Not reducing the overall liability for the Discharger beyond the factors considered so far is projected to result in up to an additional \$10/month sewer cost to Niland residents, who will be facing a substantial sewer rate

---

<sup>3</sup> NSD also faces CalPEERs overdue and unpaid contributions.

## EXHIBIT C

increase regardless of the ultimately liability assessed<sup>4</sup>. Based on the foregoing, and in consideration to the commitment of all of the key stakeholders to bring the Discharger in compliance with Board orders, the Prosecution Team recommends that the Colorado River Basin Water Board further reduce the liability to \$250,000 in discretionary liability, a reduction of approximately 52%. This would cut the monthly surcharge faced by rate payers to settle this matter substantially proportionally also.

### 8. ECONOMIC BENEFIT

Pursuant to Water Code section 13327, determining the amount of the civil liability to be imposed shall take into consideration any economic benefit or savings derived from the acts that constitute a violation. As documented in the Stipulation, the Discharger has delayed completion of Milestone No. 4 described in the 2009 CDO. This milestone required completion of design for the WWTP improvements. Based on the submittals for Milestone No. 1, the cost for design and engineering WWTP and collection system improvements is approximately \$1,332,000. The deadline to complete Milestone No. 4 was July 31, 2014. To date, the milestone has not been achieved and it is unknown whether any engineering costs have been incurred by the Discharger. As a result, the Discharger has realized a time-value savings by delaying the capital outlay.

The BEN financial model (Version 5.6.0) provided by the United States Environmental Protection Agency was used to compute the total economic benefit of noncompliance. Cost estimate and other assumptions are detailed in the attached table. The model assumes a noncompliance date for engineering expenses of July 31, 2014. The compliance date is conservatively assumed to be January 19, 2017<sup>5</sup> for calculation purposes. Although the Discharger will likely not have completed improvement design by this date, the Prosecution Team believes this to be a fair assessment due to unforeseen challenges the Discharger has been faced with related to project planning. For computational purposes, the penalty payment date was established as January 19, 2017. Based on specific assumptions within the model, the total economic benefit of noncompliance was determined to be approximately \$72,639.

The Enforcement Policy requires that the adjusted Total Base Liability Amount be at least 10% higher than the economic benefit amount, or \$79,903 (rounded), unless otherwise required by law. \$79,903 is below the minimum liability amount pursuant to CWC 13350(e)(1)(B) as set forth below.

### 9. MAXIMUM AND MINIMUM LIABILITY AMOUNTS

The maximum liability is \$4,575,000 (915 days of violation x \$5000/day). (Wat. Code §, 13350, subd. (e)(1).)

Pursuant to CWC sections 13350(e)(1)(B) and 13350(f), the minimum liability amount is \$91,500 (915 days of violation x \$100/day) unless the Colorado River Basin Water Board

---

<sup>4</sup> The Discharger will have to pay \$220,000 in MMP. Because grants will fund the entire cost of the Preferred WWTF Project it does not qualify as a Compliance Project.

<sup>5</sup> January 19, 2017, was the date the Parties originally scheduled to bring this Stipulation before the Colorado River Basin Water Board.

## EXHIBIT C

makes express findings setting forth the reasons for imposing a lower amount based on the specific factors required to be considered pursuant to CWC section 13327.

The proposed liability of \$250,000 falls within the maximum and minimum liability amounts.

### **B. USED UNCERTIFIED LABORATORY (Non-MMP violations)**

#### 1. POTENTIAL FOR HARM FOR DISCHARGE VIOLATIONS

This factor is not applicable because those violations are non-discharge violations.

#### 2. PER GALLON AND PER DAY ASSESSMENT FOR DISCHARGE VIOLATIONS

This factor is not applicable because those violations are non-discharge violations.

#### 3. PER DAY ASSESSMENT FOR NON-DISCHARGE VIOLATIONS:

This factor is determined by a matrix analysis using the potential for harm and the deviation from requirements.

The potential for harm is moderate because while the Discharger's failure to use a certified laboratory, as required by WDRs Orders R7-2003-0049 and R7-2008-0020, undermines the Regional Water Board's ability to determine whether the Discharger is in compliance with the effluent limitation for E. coli. There is no evidence to suggest that the results analyzed by the uncertified lab were inaccurate. However, lack of certification for the analyses performed raises the question of reliability. There was common practice that most of wastewater treatment plants around the Imperial Valley using nearly uncertified laboratory for saving time and expenses. Environmental Laboratory Accreditation Program (ELAP) certification is the State Department of Health Services method of verification that the Lab is qualified to perform the analyses. Without the proper certification, the quality and validity of the data is indeterminate. The deviation from requirements is moderate because a laboratory was used to analyze the samples, rather than no laboratory at all. NSD'S failure to use a certified lab (an Imperial County wide issue) should be weighed against the NSD's good faith efforts to obtain the required sampling and an increased consideration to findings, for a constituent (E. Coli) with a low potential for harm. The lab in question had been properly certified in the past and also had achieved interim certification for the subject test. It should be noted that since the E. Coli concentrations in receiving water (R Drain) were much higher than the effluent limitation levels imposed by the RWQCB for that same time period, the potential for harm from NSD violation should be considered low. The raw water samples in the R Drain ranged from 110 MPN/100ML to 900 MPN/100ML according to 2008 Reports. The deviation from requirements is moderate given that NSD complied with the testing requirements, and had obtained prior verification of laboratory certification. The intended effectiveness of the requirement has been partially compromised (moderate) but not necessarily rendered ineffective (major). **Therefore, the Prosecution Team assigned a per day factor of 0.3 for these thirty-five (35) violations.**

Applying the per day factor to the number of violations times \$10,000 per violation yields an initial liability of \$105,000 (number of violations x per day factor x maximum statutory liability per violation). This is the initial liability for using an uncertified lab.

#### 4. ADJUSTMENTS TO DETERMINATION OF INITIAL LIABILITY

## EXHIBIT C

### *Culpability*

The Discharger has a minor degree of culpability. This assessment is based on the fact that the Discharger had no knowledge that the laboratory it had been using was not properly certified. **Therefore, the Prosecution Team assigned a culpability factor is 0.5.**

### *Cleanup and Cooperation*

This assessment is based on the fact that the Discharger contracted with a certified laboratory immediately after it became aware that the laboratory it had been using was not properly certified. The Discharger has returned to compliance already. **Therefore, the Prosecution Team assigned a cleanup and cooperation factor is 0.75.**

### *History of Violations*

Even though the Discharger has been issued one TSO, two CDOs and three ACL Complaints under enforcement matters, the Discharger has no prior violations for the use of uncertified laboratories, a non-discharge violation. More importantly, NSD made reasonable attempts to document laboratory certification and was acting on the presumption that the obtained certifications were accurate. The loss of certification by the subject lab was related to a change in applicable regulations and virtually every permittee in Imperial County was similarly impacted by the loss of certification. **Therefore, the Prosecution Team assigned a history of violation factor is 1.0.**

### 5. TOTAL BASE LIABILITY AMOUNT

Applying the adjustment factors to the initial liability ( $\$105,000 \times .5 \times 0.75 \times 1.0$ ) yields \$39,375 which represents the total base liability amount.

### 6. ABILITY TO PAY AND ABILITY TO CONTINUE IN BUSINESS

Please refer to previous discussion for "Ability to Pay and Ability to Continue in Business" for the CDO violations.

### 7. OTHER FACTORS AS JUSTICE MAY REQUIRE

For the reasons set forth in the above "Other Factors as Justice May Require" for the CDO violations, in consideration of Environmental Justice Issues and Prevailing State Interests, the Prosecution Team recommends that the Regional Water Board further reduce the Total Base Liability Amount by a factor of 0.3 and then another 50%, which results in a \$5,900 (rounded) discretionary liability. This would cut the monthly surcharge faced by rate payers to settle this matter substantially proportionally also.

### 8. ECONOMIC BENEFIT

Pursuant to Water Code section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute a violation. As alleged in the Stipulation, the Discharger was in violation of WDRs Order R7-2003-0049 and its MRP beginning July 1, 2008 through November 18, 2008, and in violation of WDRs Order No. R7-2008-0020 and its MRP beginning November 19, 2008 through January 26, 2009. During this time period, the Discharger conducted E. coli sampling on 35 occasions where the Discharger should have sent the samples to a certified laboratory. The closest certified lab to the WWTP was in San Diego. Instead, the Discharger relied on an

## EXHIBIT C

uncertified lab for sample analysis. As a result, the Discharger incurred a financial savings by avoiding sample transportation or shipping to San Diego. Assuming a commercial courier rate of \$20 per sampling event, the Discharger likely avoided \$700 in expenses. Considering the nearest courier drop-off location is in El Centro, the Discharger also avoided approximately \$1,433 in mileage expenses.

The BEN financial model (Version 5.6.0) provided by the United States Environmental Protection Agency was used to compute the total economic benefit of noncompliance. Cost estimate and other assumptions are detailed in the attached table. The model assumes a noncompliance date for engineering expenses of July 1, 2008. The compliance date is assumed to be January 26, 2009 for calculation purposes. For computational purposes, the penalty payment date was established as January 19, 2017. Based on specific assumptions within the model, the total economic benefit of noncompliance was determined to be \$2,420.

The Enforcement Policy requires that the adjusted Total Base Liability Amount be at least 10% higher than the economic benefit amount, or \$2,662.

### 9. MAXIMUM AND MINIMUM LIABILITY AMOUNTS

The maximum liability provided for by statute is \$350,000 and the minimum liability amount required by the Enforcement Policy is \$2,662 (Economic Benefit + 10%).

The Enforcement Policy requires that the discretionary administrative civil liability must not exceed the maximum liability amount nor be less than the minimum liability amount.

The proposed liability of **\$5,900** is greater than the minimum liability amount and lower than the maximum liability amount.

## **RECOMMENDATIONS FOR DISCRETIONARY PENALTY**

1. A - Failure to Meet CDO R7-2012-0024 Milestone No.4 (915 days of violation): The proposed administrative liability is **\$250,000**
2. B - Used Uncertified Laboratory (35 days of violation): The proposed administrative liability is **\$5,900**.

The Prosecution Team recommends a total proposed administrative liability of **\$255,900** for the discretionary penalties.

### **Attachment:**

- A. Economic Benefit Table